No. 21991

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN CLIFFORD JAMES,	)
Petitioner and Appellant,	)
vs.	)
LOUIS S. NELSON, Warden, California State Prison, San Quentin,	)
Respondents and Appellees.	)

APPELLEE'S PETITION FOR REHEARING

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

LOUISE H. RENNE
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1337

Attorneys for Appellees

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TO THE HONORABLE J. WARREN MADDEN, JUDGE OF THE UNITED STATES COURT OF CLAIMS, AND M. OLIVER KOELSCH AND JAMES R. BROWNING, CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to the United States Court of Appeals for the Ninth Circuit Rule 23, Title 28 United States Code, appellee, Louis S. Nelson, Warden, San Quentin Prison, California, hereby petitions for a rehearing to consider the order filed in this action on March 11, 1968, which states:

> "The order of the United States District Court, denying Petition for a Writ of Habeas Corpus, is vacated and the cause is remanded with directions to hold an evidentiary hearing limited to the question of the voluntariness

of oral admissions made by petitioner, and of whether or not (in the event they are found to have been coerced) he deliberately waived objection to their introduction into evidence at the trial. Maldonado v. Eyman, 377 F.2d 526 (9th Cir. 1967)."

This order is erroneous for two reasons: First, it overlooks evidence and clear conclusions which must be drawn from the state court records presently lodged with the Court; and, second, the documents filed by appellant after appellee's brief was filed but before submission of the cause, show that appellant now denies making the oral confessions, which he earlier claimed were coerced. In amplification of these grounds, the following is stated:

I

The state court records belie appellant's claims of a coerced confession. The transcripts of trial lodged with the Court show that Police Officer Rainey testified that appellant twice admitted his guilt in the holdups, first, at a local police station on the afternoon of May 26, 1959, and, later, the next morning at the Hall of Justice when shown his accomplice's confession. Officer Rainey testified that neither force nor threats were used. (RT II 29, 31, 34).

When appellant took the stand, he denied participating in the robberies, and was silent about the alleged

admissions he had made. Although he testified that he had been informed of his accomplice's confession, he denied having seen his accomplice's confession until the preliminary hearing. (RT II 46-61, 52-53.) The only possible hint of coercion to which appellant testified was that he had been told he was "chicken" because he did not have the "guts to clean up the books" (RT II 53-54). However, this was a remark which was specifically denied by Officer Rainey when recalled to the stand, and is not coercion of a type to overbear the will.

The state court records, therefore, show that appellant did not rebut the state's proffered testimony at trial, and, that if an issue of involuntariness was raised, it was raised in a most fleeting and inconsequential manner. However, from appellant's failure to specifically assert coercion at trial, despite the opportunity to fully raise the issue at a time when he was represented by adequate and competent counsel and, further, because of the failure to explain since then either why he did not urge coercion, (or, indeed, until rather recently, why he implicitly denied having even made the second statement) the conclusion must be drawn that appellant's charges of coercion are without merit and contrived.

II

Any doubt as to the invalidity of appellant's petition is put to rest by the "Application to Amend and

Motion for Production of Documents" and "Appellant's First Amended Brief" (treated by this Court as a reply brief), after these documents were received by the Court on November 15, 1967.

Until these documents were filed, appellant had claimed throughout these habeas corpus proceedings that the confessions were coerced. See e.g., Appellant's Opening Brief at page 5. Now, however, in these amended documents, appellant has stated that he never admitted his guilt, despite the coercion heaped upon him. See e.g., pages 2-3 of the "Application," and pages 5, 7, and 9 of Appellant's Reply Brief. The ordered evidentiary hearing, therefore, can serve no purpose since appellant now claims he never made the admissions allegedly coerced. Under these circumstances, therefore, the petition should be denied now without a hearing and without having incurred needless taxpayer expense or inconvenience to witnesses.

To the extent that petitioner now has changed his theory of relief from a charge of coerced confession to a charge of perjured testimony, we point out first, that petitioner has failed to allege that the issue in this particular form, has been presented in the state courts, as he also fails to allege a knowing use of such alleged perjured testimony.

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CONCLUSION

For the above reasons, it is respectfully requested that the petition for rehearing be granted.

Dated: April 10, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

Louise H. Renne

LOUISE H. RENNE (Mrs.)
Deputy Attorney General

Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellee, Louis S. Nelson, in the above-entitled action, and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated: April 10, 1968

Louise H. Renne

LOUISE H. RENNE (Mrs.)
Deputy Attorney General